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this rule is subject to qualifications. Except for merely incidental injuries, where the public benefit is very great in comparison with the private annoyance, an action for damages will lie.² And, to avoid abatement, it must be shown that the legislature plainly contemplated, and intended to authorize the specific act committed.³ Unless the injury complained of is the necessary result of the power given, an injunction will ordinarily be granted.⁴ The principal case was decided upon the ground that the legislature had authorized the precise act of the defendant.

But the case in which a legislature grants to a public utility privileges which, but for the paramount benefit to the public, would infringe private rights, is clearly distinguishable from the case where a legislature, by exercising its police power, regulates the operation of a business in order to prevent the infringement of the rights of others—in order to prevent, for instance, the maintenance of nuisances. In the one situation the legislative power is exercised for the public benefit through the business of a corporation or an individual; in the other it is exercised against the business in order to protect the rights of the public and of individuals. It is submitted that the legislature of Oklahoma in thus regulating a purely private business—in telling the defendant where it could *not* go except for the mine inspector's certificate—should not be held to have intended to authorize the maintenance of a nuisance in those places from which the statute did not exclude the business.

H. E. A.

PROPERTY: ADVERSE POSSESSION OF RAILROAD RIGHT OF WAY.—In *Central Pacific Railway Company v. Droge*,¹ it was held that an individual could not acquire title by adverse possession to any part of the four hundred foot right of way granted by Congress to the plaintiff's predecessor. The decision follows the rule laid down by the United States Supreme Court,² that the grant of this strip was a conclusive determination by Congress that it was necessary for railroad purposes, and that the grant was only of a qualified fee, which would revert to the United States should the grantee attempt to use the land for other than railroad purposes. Since the road could not grant any part of the way directly, it could not do so indirectly, and, therefore, adverse possession, which rests on a presumed grant, would give no title.

² Wood, Law of Nuisances, §§ 750, 752.

³ *Payne v. Town of Wayland* (1906), 131 Iowa, 659, 109 N. W. 203; Wood, Law of Nuisances, §§ 746, 750, 751, 754. See also 3 California Law Review, 503.

⁴ *Baltimore & Potomac R. R. Co. v. Fifth Baptist Church* (1883), 108 U. S. 317, 27 L. Ed. 739, 2 Sup. Ct. Rep. 719; Wood, Law of Nuisances, § 746.

¹ (Aug. 31, 1915), 50 Cal. Dec. 277, 151 Pac. 663.

² *Northern Pac. Ry. Co. v. Townsend* (1903), 190 U. S. 267, 47 L. Ed. 1044, 23 Sup. Ct. Rep. 671.

But where the right of way is acquired in the ordinary manner, by condemnation or purchase from the private owners, the weight of authority allows title to parts of the way not in actual use to be acquired by adverse possession.³ This rule rests on the doctrine that the statute of limitations is a statute of repose giving an absolute title after the period has run, irrespective of any presumed grant. The railroad is also held to be essentially engaged in a private business and liable to lose its property through the negligence of its officers or agents as would any other person. The railroad can get the land if necessary for its purposes by a new condemnation proceeding.

A minority of jurisdictions hold, however, that a railroad is a public highway, and that the maxim *nullum tempus occurrit regi* applies to prevent any title being acquired by adverse possession, by an extension of the doctrine which is almost universally applied to the state and its subordinate agencies.⁴ Of course the rule does not protect property held as a mere private owner, not necessary for the public purpose, such as the grant of the alternate sections along the route of the Pacific railroads.⁵ Nor will there be any exemption when the statute of limitations is expressly allowed against the state itself.⁶ While the question is decidedly close, it seems that the minority view is preferable. It is to the public interest for a railroad to anticipate its needs in acquiring a right of way, and no harm is done by permitting adjoining property owners to cultivate the excess land until it is needed for tracks or other railroad purposes. Some courts hold such use to be permissive and not adverse until it actually conflicts with the railroad use, or until notice of its adverse character is brought home to the railroad;⁷ others hold that it is inconsistent with the railroad's easement, which is more than a mere right of way and requires the

³ 2 C. J. 225, and cases cited in note; 15 Harvard Law Review, 146; 12 Michigan Law Review, 144; Ill. Cent. R. Co. v. Houghton (1888), 126 Ill. 233, 18 N. E. 301, 1 L. R. A. 213, 9 Am. St. Rep. 581; Matthews v. L. S. & M. S. Ry. Co. (1896), 110 Mich. 170, 67 N. W. 1111, 64 Am. St. Rep. 336; Northern Pac. Ry. Co. v. Ely (1901), 25 Wash. 384, 65 Pac. 555; 54 L. R. A. 526, 87 Am. St. Rep. 766; Bobbett v. The South Eastern Ry. Co. (1882), 9 Q. B. Div. 424.

⁴ Southern Pac. Co. v. Hyatt (1901), 132 Cal. 240, 64 Pac. 272, 54 L. R. A. 522; C. M. & St. P. Ry. Co. v. Hanken (1908), 140 Iowa, 372, 118 N. W. 527; Conwell v. Phil. & R. Ry. Co. (1913), 241 Pa. 172, 88 Atl. 417. The same result was reached by statute in Mass., Mo., N. H., N. C., and Vt.

⁵ Toltec Ranch Co. v. Cook (1903), 191 U. S. 532, 48 L. Ed. 291, 2. Sup. Ct. Rep. 166.

⁶ Louisville & N. R. Co. v. Smith (1907), 125 Ky. 336, 101 S. W. 312

⁷ Railroad v. French (1897), 100 Tenn. 209, 43 S. W. 771, 66 Am. St. Rep. 752; Roberts v. Sioux City etc. Ry. Co. (1905), 73 Neb. 8, 102 N. W. 60, 2 L. R. A. (N. S.) 272, 10 Ann. Cas. 992; Dulin v. Ohio River R. Co. (1913), 73 W. Va. 166, 80 S. E. 145; Lewis, Eminent Domain, 3d ed., § 848.

exclusive use of the surface, hence that the use is adverse, especially if the railroad only fences in a portion of the right of way taken and the abutting owner fences the outer portion in with his own land.⁸ In view of the wide area traversed by the railroads, and the character of the right of way the former view seems more equitable. The same rule should be applied as to public highways, that the public interest predominates and that the railroad should not lose its right of way through the negligence of its local agents, any more than the public itself is barred by the carelessness of its officers.

J. S. M., Jr.

PUBLIC LANDS: OREGON LAND GRANT CASE: CONDITION OR COVENANT.—A case of more than ordinary interest to the West because of the magnitude of the interests involved and the number of individuals directly or indirectly affected by the decision is that of the *Oregon & California Railroad Company v. United States*.¹ In addition to numerous settlers on the lands in question who were made defendants, there were about six thousand other persons who intervened because of their interest in the outcome.

The case was certified to the Supreme Court of the United States by the Circuit Court of Appeals for the Ninth Circuit, bringing up for review a decision of the federal District Court for the District of Oregon, which decreed a forfeiture to the United States of over two million acres, being the unsold portion of the land grant to the appellant railroad. This grant had been made by Act of Congress in 1866 and amended on subsequent dates² and contained provisos that the lands granted by the act "shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre." While for a time the railroad grantee complied with the terms of the grant, its successor in interest in many instances sold the lands embraced in the grant for more than two and one-half dollars per acre and in parcels exceeding one hundred and sixty acres and to others than actual settlers, and finally in 1903 withdrew from sale altogether over two million acres then remaining unsold, asserting that they were timber lands and unsuitable for settlement. The government contended that the provisos in the grant constituted conditions subsequent and that the failure to comply with these conditions resulted in a forfeiture of the lands to the United States. The railroad company insisted that these provisos were merely restrictive and unenforceable covenants. The determination of this question turned upon whether these re-

⁸ *Southern Ry. Co. v. Gossett* (1908), 79 S. Car. 372, 60 S. E. 956; *Ill. Cent. R. Co. v. Houghton*, *supra*, note 3; *Matthews v. L. S. & M. S. Ry. Co.*, *supra*, note 3.

¹ (June 21, 1915), 35 Sup. Ct. Rep. 908.

² 14 Stat. at L. 239; 16 Stat. at L. 47; 16 Stat. at L. 94.